CEDRIC DE KOKER*

1 INTRODUCTION

As a result of the evolution in the tasks and responsibilities undertaken by contemporary peace operations in states emerging from conflict, peacekeepers have increasingly become involved in activities that otherwise would be performed by state authorities[1]. According to DIEHL et al., these activities include amongst others election supervision, humanitarian assistance during conflict, state/nation-building, pacification, arms control verification, protective services, intervention in support of democracy, and sanctions enforcement[2]. This situation raises questions about the applicability of international human rights law (IHRL) to peacekeepers, as well as about their accountability under that body of law. Arguably, one could make the case – as the proponents of the applicability of IHRL to peace operations have done – that peacekeepers, acting as a surrogate of the state, should respect IHRL in their dealings with individuals, just as the state itself, and should be held accountable for any rights-violating conduct.

However, applying IHRL to peace operations is not without difficulties and it should not come as a surprise then that some states, such as the United States and Israel, as well as several legal scholars have opposed the idea[3]. After all, the unique nature of peace operations has given rise to complex legal issues – i.a. the extraterritorial application of HRL, the relationship between IHRL and international humanitarian law and the accountability of international organizations – , which in turn have made the application of IHRL a multifaceted and often controversial issue[4].

This is especially visible with regard to detention, an area in which human rights protection has traditionally played a very important role. Peacekeepers have in the past detained individuals for a variety of reasons, but it remains unclear to which extent they are bound by the vast body

* Academic assistant at the Department of Penal Law and Criminology of the Faculty of Law, Ghent University and a member of the Institute of International Research on Criminal Policy (IRCP).

[1] On the evolution of peace operations, see a.o. United Nations Peacekeeping Operations: Principles and Guidelines. (2008).; ALEX J. BELLAMY, et al., UNDERSTANDING PEACEKEEPING (Polity Press. 2004);Ramesh Thakur & Albrecht Schnabel, United Nations Peacekeeping Operations: Ad Hoc Missions, Permanent Engagement (The United Nations University Press 2001).

[2] Paul F. Diehl, et al., *International Peacekeeping and Conflict Resolution. A Taxonomic Analysis With Implications*, 42 JOURNAL OF CONFLICT RESOLUTION 33, 39-40 (1998).

[3] As will be illustrated in more detail below, the main arguments to oppose the applicability of IHRL to peace operations relate to the fact that the application of IHRL would jeopardize the effectiveness of the operations, that there is a fundamental tension between international peace and security on the one hand and human rights on the other and that the different requirements for applicability of specific human rights treaties are not likely to be met during peace operations. See KJETIL MUJEZINOVIC LARSEN, THE HUMAN RIGHTS TREATY OBLIGATIONS OF PEACEKEEPERS 60- 61 (Cambridge University Press. 2012).

[4] It should be noted that these problems are not exclusively encountered in the context of peace operations.

of rules codified in human rights treaties and case law or the extent to which they can be held accountable for their misbehavior. This leaves room for abuse, as has been demonstrated by the recurring reports of peacekeepers violating the human rights of detainees with relative impunity. Clearly, this is a dismal situation and additional clarity is warranted, both in the interest of the detainees and the international community.

In this paper, it will be attempted to address some of the complex legal issues mentioned above. Due to constraints in time and words, the analysis will, however, be limited to the first part of the problem and focus on the extent to which, if at all, IHRL is applicable to peacekeepers, specifically when handling detainees. With regard to the accountability of peacekeepers for human rights violations committed when the detainee was in their custody, the present writer would kindly like to refer the reader to the relevant literature on the subject[5].

2 HUMAN RIGHTS OBLIGATIONS OF PEACEKEEPERS

As to the human rights obligations of peacekeepers, two important questions have to be asked. Logically, the first question is: do peacekeepers have any obligations under IHRL? In other words, does human rights law apply during peace operations? If this is answered affirmatively, the second question is whether the full range of human rights are applicable during peace operations, and, consequently, whether peacekeepers have to guarantee all the civil, political, social, economic and cultural rights of the detainees in their custody?

2.1 DOES HUMAN RIGHTS LAW APPLY?

Although the origins of human rights law and peace operations can be traced back to the immediate aftermath of the second world war, with the adoption of the Universal Declaration of Human Rights and the establishment of the first UN-peace operation, UNTSO in 1948, for a long time, the application of the former to the latter has not been an issue[6]. At the time, it was generally accepted that a clear division between the law that applied during war and the law that applied in peacetime existed and, as HEINTZE has stated, that "depending on the state of international relations, either the *corpus juris* of the law of peace or that of the law of war was applied"[7].

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[5] See among others Tom Dannenbaum, *Translating the Standard of Effective Control into a System of Effective Accountability: How Liability Should be Apportioned for Violations of Human Rights by Member State Troop Contingents Serving as United Nationas Peacekeepers*, 51 HARVARD INTERNATIONAL LAW JOURNAL 113(2010);Frederick Rawski, *To Waive or Not to Waive: Immunity and Accountability in U.N. Peacekeeping Operations*, 18 CONNECTICUT JOURNAL OF INTERNATIONAL LAW 103(2002); Magne Frostad, *The Responsibility of Sending States for Human Rights Violations during Peace Support Operations and the Issue of Detention*, 50 MILITARY LAW AND THE LAW OF WAR REVIEW 127(2011) .

[6] LARSEN, The Human Rights Treaty Obligations of Peacekeepers 42. 2012.

[7] Hans-Joachim Heintze, *On the Relationship between Human Rights Law Protection and International Humanitarian Law*, 86 INTERNATIONAL REVIEW OF THE RED CROSS 789, 789 (2004).

Since peace operations were generally established to help supervise the transition between war and peace and as a result, were often deployed to hostile situations that cannot truly be qualified as peacetime, IHRL, which was considered as the law of peace, would not be applied.

It is only in recent years that the application of IHRL has been pushed to the forefront of both public and scholarly debate. Although certainly not the only reason, the controversies surrounding past peace operations, where peacekeepers have violated the human rights of the people they were supposed to protect, have played a key role in this regard[8]. However, whenever the application of IHRL was considered, states were eager to reject the possibility by arguing that IHRL does not "fit within a context of […] peace operations and that, for various reasons, it would be inappropriate or counter-productive […] to consider human rights law as legally binding in this context"[9]. This so-called 'square peg, round hole'-argument has been used on numerous occasions in different forms by multiple states[10]. Hereby, they have implicitly claimed that demanding states to uphold the full range of human rights would, at least at the outset of peace operations, places too onerous obligations upon participating states and would negatively influence the efficiency and effectiveness of the operation.

It is not entirely unsurprising that states participating in peace operations try to circumvent the application of IHRL, as they see the extensive legal obligations as an impediment to the achievement of the – often political – goals of the mission. This, however does not mean that these arguments should be discarded as mere political strategy. On the contrary, a closer look reveals that there is some truth to the concerns uttered by states. As IHRL was conceived to address a specific situation – namely to "apply to the relationship between unequal parties, protecting the governed from their governments"[11] -, the goals of IHRL are not necessarily in line with the goals a peace operation attempts to achieve. At times, they even run directly in counter to each other. An example would serve to clarify this point.

[8] Over the last couple of years, numerous reports of violative conduct has reached us, ranging from instances of sexual exploitation by peacekeepers during MONUC, to allegations of prisoners abuse during the peace operations in Somalia, Iraq and Afghanistan and news of the failures to prevent genocides in Rwanda and Srebrenica.

[9] LARSEN, The Human Rights Treaty Obligations of Peacekeepers 60. 2012.

[10] Germany, for example, has argued in their written submissions in the *Behrami/Saramati-case* that "it must be acknowledged quite frankly that at least during a first stage of a peace operation, the standards of [the ECHR] can hardly ever be maintained to a full extent", see LARSEN, The Human Rights Treaty Obligations of Peacekeepers 77. 2012. In the same sense, the government of the United States of America (USA) has repeatedly stated that the norms and standards of IHRL do not translate very well to the often hostile situations in which peace operations are expected to work and that as a result, IHRL is not the appropriate legal framework to regulate the conduct of peacekeepers.

[11] Theodor Meron, *The Humanization of Humanitarian Law*, 94 THE AMERICAN JOURNAL OF INTERNATIONAL LAW 239, 240 (2000).

Under IHRL, BELLINGER & PADMANABHAN note, "criminal detention is the primary route to incapacitation of threats"[12]. Administrative detention – i.e. the detention of an individual without trial –, on the other hand, is often prohibited and even if a specific treaty allows for the possibility, it can usually only take place as an exceptional measure subject to strict requirements[13]. Clearly, the underlying idea is to limit the powerful state in bypassing judicial supervision when detaining individuals. During military operations in general and peace operations in specific, however, administrative detention might be the only possible form of detention available to the participating states. After all, to justify criminal detention, a state will have "to possess admissible evidence that establishes that an individual violated an existing law, and that satisfies a high standard of proof, such as beyond a reasonable doubt"[14]. Such evidence is extremely hard to obtain in the difficult circumstances peacekeepers regularly find themselves in and states will, at least in the early stages of the operation, more often than not have to resort to administrative detention to keep individuals who have committed crimes or in any other way represent a threat to the peace and security in their area of operation off the streets. Clearly, to apply IHRL here and require states to refrain from using administrative detention would be counterproductive and difficult to reconcile with the aim of the peace operation which consists in restoring peace and order as fast as possible.

Therefore, although some states have certainly stretched the limits of the argument beyond what can be considered as reasonable and have gone "unjustifiably far in denying the applicability of human rights law during […] peace operations", these concerns should definitely be taken into account when considering the application of IHRL to peace operations[15].

2.1.1 GRADUAL ACCEPTANCE OF APPLICABILITY BY STATES AND LEGAL SCHOLARS

Despite the above-mentioned objections, however, the relevance of human rights law during peace operations has gained support over time, both within state governments and academia. Two different trends can be identified to explain the gradual acceptance of its applicability, notably the increased complexity of peace operations and the different mindset towards human rights within the international system.

First, and this has already been stated above, the evolution in the tasks and responsibilities undertaken by contemporary peace operations in states emerging from conflict have made peace

[12] John Bellinger & Vijay M. Padmanabhan, *Detention Operations in Contemporary Conflicts: Four Challenges for the Geneva Conventions and other Existing Law*, 105 THE AMERICAN JOURNAL OF INTERNATIONAL LAW 201, 211 (2011).
[13] The European Convention for Human Rights, for example, allows administrative detention only in the well described situations (for educational purposes, in case of flight risk, to prevent a infectious disease from spreading and in the context of migration) of Article 5, §1 (d) – (f). Other forms of administrative detention, such as detention for security reasons where there is no intention to bring criminal charges within a reasonable time, are prohibited.
[14] Bellinger & Padmanabhan, THE AMERICAN JOURNAL OF INTERNATIONAL LAW, 212 (2011).
[15] LARSEN, The Human Rights Treaty Obligations of Peacekeepers 76. 2012.

operations much more complex and have expanded the activities of peacekeepers into area's that previously were state prerogatives and traditionally governed by IHRL. In some cases, the peace operations have even had to replace the state authorities in its entirety and govern the territory in which they are deployed themselves[16]. As a result, peace operations today are much more diverse and multi-dimensional, comprising both military and civilian components. Obviously, and as LARSEN has aptly noted, "when [peacekeepers] take over the functions of the state, it is inevitable that questions will arise regarding [the peacekeeper]'s compliance with the human rights of the civilian population in the area of deployment"[17]. Pondering about these questions, state governments and legal scholars – with some notable exceptions, such as the USA – have come to realize that IHRL can be relevant during peace operations and that peacekeepers, acting as a surrogate of the state, cannot completely ignore IHRL in their dealings with individuals.

This especially visible in the context of detention. During the early peace operations of the Cold War period the detention of individuals was in essence military in nature. The peacekeepers only detained so called *spoilers*, i.e. individuals who attempted to frustrate the peace process by for example violating cease fire-agreements. Later on, when the peace operations became more multi-dimensional, peacekeepers were sometimes called upon to detain and try common criminals and civilians posing a threat to security, normally a prerogative of state authorities. This has added an entirely new dimension to the work of the peacekeepers as different interests, rules and standards come into play. After all, law enforcement has traditionally been an area in which IHRL has played a significant role and since the rules of international humanitarian law are less suited to apply in the context of law enforcement, it appears difficult to completely reject the applicability of IHRL as this would create a legal vacuum.

The second trend, namely the evolution towards a different mindset towards human rights in the international system, has only reinforced arguments in favor of the applicability of IHRL. Since the adoption of the Universal Declaration of Human Rights in 1948, which was a collection of general norms with more moral than legal force, the IHRL has evolved into a well-elaborated and precise set of legally binding rules and standards, codified in human rights treaties and su-

[16] This was the case, for example, in Kosovo and East Timor, where after a violent conflict there was no functioning government after the public officials of Serbia and Indonesia had retreated from the respective territories. To fill the governmental vacuum, the peace operations – UNMIK and UNTAET – installed transitional administrations. On the subject, see a.o. ERIC DE BRABANDERE, POST-CONFLICT ADMINISTRATIONS IN INTERNATIONAL LAW : INTERNATIONAL TERRITORIAL ADMINISTRATION, TRANSITIONAL AUTHORITY, AND FOREIGN OCCUPATION IN THEORY AND PRACTICE (Martinus Nijhoff Publishers. 2009).

[17] LARSEN, The Human Rights Treaty Obligations of Peacekeepers 44. 2012.

pervised by international courts and tribunals[18]. Additionally, within the international community, different organizations, and especially the UN, have gone through significant lengths to integrate a human rights perspective into their daily work and policies. The protection of human rights has become an important part of the work of international organizations and as a result, has influenced other areas of international law[19]. With regard to peace operations in general and detention during these operations in specific, these two developments have had two noteworthy consequences. The first being that as a result of the increased attention to human rights protection, there is a growing awareness of the role peacekeepers can play with regard to the protection of the human rights of the civilians living in the area of deployment and the individuals they detain. The second is that since human rights claims are increasingly formulated as legal claims, more consideration has been given about what the peacekeepers have a legal obligations to do under IHRL. In recent years, the amount of detention-related cases against states participating in peace operations before both national and international courts have increased exponentially and the claims were often formulated with the legal obligations of IHRL in mind. Again, these developments have led to the recognition amongst states and legal scholars that it has become difficult to completely deny the applicability of IHRL during peace operations and with regard to the detention that occurs in the course of it.

2.1.2 INTERNATIONAL JURISPRUDENCE AND THE EXTRATERRITORIALITY OF HUMAN RIGHTS LAW

Although states and international organizations had gradually accepted the applicability of IHRL, it was waiting for a clear statement by one of the international judicial and quasi-judicial human rights bodies to completely open the door for the application during peace operations of the extensive body of detention-related rules and standards found in human rights treaties. Given the fact that, as stated earlier, cases relating to detention during peace operations were increasingly formulated in human rights terms and brought before judges, it was only a matter of time before a one of the human rights bodies would pronounce on the issue.

In effect, in several recent cases, human rights bodies have had to determine whether the specific human rights treaties were applicable to the activities of the state parties when they were engaged in peace operations. Since peace operations as a rule take place outside the territory of the participating states, one of the issues that had to be resolved in order to come to a judgment in these cases related to the controversial and heavily debated extra-territorial application of IHRL.

[18] This evolution has been adequately named 'the legalization of human rights law', see Saladin Meckled-Garcia & Basak Cali, The legalization of human rights: multidisciplinary perspectives on human rights and human rights law (Routledge 2006).

[19] This is what MERON has called 'the humanization of international law', see o.a. Meron, THE AMERICAN JOURNAL OF INTERNATIONAL LAW, (2000);THEODOR MERON, THE HUMANIZATION OF INTERNATIONAL LAW (Brill Academic Publishers. 2006).

Despite the continued resistance on the part of some states, such as the USA and Israel, it is important to note that most of these human rights bodies have at a certain point in time ruled in favor of applying IHRL to peace operations and that as of now, the extra-territorial application of specific human rights treaties is well supported in case law. The Human Rights Committee has explicitly endorsed the extra-territorial application of the ICCPR, amongst others during peace operations, in General Comment No. 31 and subsequent rulings, stating that:

> *The enjoyment of Covenant rights is not limited to citizens of State Parties but must also be available to all individuals […] who may find themselves in the territory or subject to the jurisdiction of the State Party. This principle also applies to those within the power or effective control of the forces of a state party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace enforcement operation*[20].

The International Court of justice (ICJ) later adopted a similar stance with regard to the ICCPR in the *Wall* case, adding at the same time that under given circumstances the ICESCR and the Convention on the Rights of the Child could apply extraterritorially as well[21]. It later confirmed this in the *Armed Activities on the Territory of the Congo* case[22]. Regional human rights bodies, such as the ECtHR and IACHR, have also accepted that whenever certain requirements have been met, the scope of application of the respective treaties can extend to acts committed by state parties abroad. In *Loizidou v. Turkey*, for example, the ECtHR stated that:

> *The responsibility of a Contracting Party may also arise when as a consequence of military action – whether lawful or unlawful – it exercises effective control of an area outside its national territory*[23].

It added in a later judgment, namely in the case of *Cyprus v. Turkey*, that:

> *Any other finding would result in a regrettable vacuum in the system of human-rights protection in the territory in question by removing from individuals there the benefit of the Convention's fundamental safeguards and their right to call a High Contracting Party to account for violation of their rights in proceedings before the Court*[24].

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[20] *General Comment No. 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant,* Human Rights Committee (UN Doc. CCPR/C/21/Rev.1/Add.13), 26 may 2004.

[21] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, par. 108-113 [hereinafter *Wall* case].

[22] *Armed* Activities *on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 168, par. 215-220.

[23] *Loizidou v. Turkey (preliminary objections)*, ECtHR (application no. 15318/89), 23 march 1995, par. 62-64.

[24] *Cyprus v. Turkey,* ECtHR (application no. 25781/94), 10 may 2001,par. 78.

In sum, it is thus safe to assume that human rights treaties can be applied extra-territorially and that when the conditions for extra-territorial application are fulfilled, states will have to comply with the rules and standards enclosed therein when operating outside their own territory, including when participating in peace operations.

Obviously, for the present purposes, the next questions then becomes whether these conditions for extra-territorial application are fulfilled when peacekeepers detain individuals in the course of such an operation. In this regard, it should be noted that it is hard to make definite statements since, as DROEGE correctly noted, "it is difficult to discuss the question of extraterritorial application outside the specific wording of each international human rights treaty"[25]. Because every human rights treaty has its own scope of application, whether or not its norms and standards will apply to specific instances of detention in the peace-keeping context, will have to be determined on a *case-to-case* basis, taking into account the concrete circumstances of the detention and the application clauses of the treaty in question. Nevertheless, some general remarks can be made. For starters, the HRC, the ECtHR and the IACHR have all mentioned having jurisdiction, which was concretized as being able to excercise 'effective control' or 'authority or control' over either a territory or a person, as a basic requirement for IHRL to apply extraterritorially[26].

Second, on multiple occasions, the detention of individuals abroad has been recognized – again by the HRC, ECtHR, as well as the ICHR – as a situation in which the state can have such 'effective control' and therefore, a state detaining individuals outside its own territory should be considered as having legal obligations under IHRL. One of the early landmark cases in this regard came from the HRC with its ruling in the *Lopèz Burgos v. Uruguay*-case. The case concerned the kidnapping and incommunicado detention by Uruguayan state agents of a political dissident living in Argentina. The Court, before being able to rule on whether violations of various rights under the ICCPR had occurred, had to consider whether or not the conduct fell under the scope of application as defined in Article 2 of the ICCPR. This came down to answering whether a state had 'effective control' over the individual and as such, could be held liable under the ICCPR for acts committed by its agents outside its territory. In the end, the Court decided in favor of extraterritorial application, specifically stating that:

> *It would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State which violations it could not perpetrate on its own territory*[27].

[25] Cordula Droege, *The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict*, 40 ISRAEL LAW REVIEW 310, 325 (2007).
[26] Id. at.
[27] *Lopez Burgos v. Uruguay*, Human Rights Committee (Communication No. R.12/52, U.N. Doc. Supp. No. 40 (A/36/40)), 29 July 1981, par. 12.3.

Although the case did not concern detention in the context of a peace operation, there is no reason why the HRC would have decided differently, had this been the case. After this judgment, others quickly followed. In *Coard v. the United States*, which related to the incommunicado detention and mistreatment of individuals who were arrested by American troops during a military invasion of Granada, the IACHR held that the American Declaration applied whenever an individual finds himself subject to 'the authority and control' of a state party, even if the individual finds himself on the territory of another state[28]. The ECtHR has, for its part, built up an impressive body of case law in which it has accepted and elaborated upon the extraterritorial application of the European Convention in the context of detention[29]. Some of these cases, such as the *Al-Saadoon, Al-Jedda* and *Al-skeini* cases, specifically addressed detention during peace operations, since they all concerned the detention of individuals by armed forces of the United Kingdom active in Iraq[30]. The *Behrami & Saramati*-case belongs in that same line, as it (partly) concerned the detention of an individual by peacekeepers from UNMIK[31].

In conclusion and taking the above into account, the present writer argues that the question of whether IHRL is applicable during peace operations and consequently, whether peacekeepers have any obligations under human rights law when detaining individuals during peace operations, should be answered affirmatively. Although one will still need to examine whether, under the given circumstances, the case falls within the scope of application of the treaty in question, a consensus seem to be evolving amongst the different international judicial and quasi-judicial human rights bodies towards accepting the detention of individuals abroad, such as during peace operations, as a situation in which IHRL applies extraterritorially.

2.2 TO WHAT EXTENT DOES HUMAN RIGHTS LAW APPLY?

The next question that needs to be responded to then is whether the full range of human rights are applicable during peace operations or whether there are certain factors that have to be taken into account that may exclude or modify the application of the treaties. In response to this question, three scenario's can be identified in which the application of certain rights might be excluded or modified.

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[28] *Coard et Al. v. United States*, IACHR (Report N. 109/99 - Case 10.951), 29 September 1999, par. 37.

[29] See for example *Öcalan v. Turkey,* ECtHR (application no. 46221/99), 12 may 2005*; Issa v. Turkey,* ECtHR (application no. 31821/96), 16 november 2004.

[30] *Al-Saadoon and Mufdhi v. The United Kingdom*, ECtHR (application no. 61498/08), 2 march 2010; *Al-Jedda v. The United Kingdom,* ECtHR (application no. 27021/08), 7 July 2011; *Al-Skeini and others v. The United Kingdom,* ECtHR (application no. 55721/07), 7 July 2011.

[31] *Decision as to the admissibility of Behrami & Behrami v. France (application no. 71412/01) and Saramati v. France, Germany and Norway (application no. 78166/01),* ECtHR, 2 may 2007.

2.2.1 DEROGATIONS

A first possible circumstance in which the application of IHRL may be excluded or modified relates to the legal concept of derogations. This legal concept, which is well established in international law, allows states to temporarily suspend the application of certain norms and standards of IHRL. However, from the outset, it should be made clear that states cannot derogate at will. Several human rights treaties contain derogation clauses, which limit the possibility of suspending IHRL to certain situations and prescribe formal requirements that have to be fulfilled for the derogation to be lawful[32]. As to the situation in which derogation are permitted: although the specific wording of the derogation clauses differs, they are interpreted in a similar fashion. Derogation is only possible when a grave emergence exists which threatens the life of the nation[33]. It is important to note that derogation is an exceptional measure and states can therefore only derogate to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, color, sex, language, religion or social origin. Moreover, All derogation clauses contain a list of rights that are non-derogable. These rights are not necessarily the same under the different treaties. The formal requirements of derogations are more or less the same under the different human rights treaties. Generally, for the derogation to be lawful, the states willing to derogate will need to officially proclaim the state of emergency which warrants the derogation and inform the other state parties, as well as the relevant treaty bodies of their intent to derogate from certain provisions of IHRL.

The key issue that needs to be resolved here is, whether or not states participating in peace operation can lawfully derogate from detention-related human rights, such as the right not to be arbitrarily deprived from its liberty. In this regard, it can be noted that in general detention-related human rights do not figure on the lists of non-derogable rights and therefore can be suspended[34]. This is confirmed by actual practice, as states have for example in the past derogated

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[32] The most important derogation clauses are Article 4 ICCPR, Article 15 ECHR and Article 27 ACHR.

[33] The ECtHR has interpreted and elaborated on the notion of 'emergency' recently in the *A. and others*-case. Reaffirming its earlier jurisprudence, it stated that "the emergency should be actual or imminent; that it should affect the whole nation to the extent that the continuance of the organized life of the community was threatened; and that the crisis or danger should be exceptional, in that the normal measures or restrictions, permitted by the Convention for the maintenance of public safety, health and order, were plainly inadequate", see *A. and others v. The United Kingdom,* ECtHR (Application no. 3455/05), 19 February 2009, par. 176. It has been argued that the notion 'emergency' under the other treaties should be interpreted in a similar fashion.

[34] The Human Rights Committee has argued in its General Comment no. 29 that potentially derogable rights could have a non-derogable core. Specifically with regard to detention, it stated that "in order to protect nonderogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a state party's decision to derogate from the Convenant". This view is not generally accepted however. See *General Comment No. 29: States of Emergency (Article 4)*, Human Rights Committee (CCPR/C/21/Rev.1/Add.11), 31 August 2001.

from the right to liberty and security found amongst others in Article 9 ICCPR and Article 5 ECHR.

The problem is, however, that "the legality of derogation […] in the context of a military operation abroad is not totally certain"[35]. After all, a literal interpretation of the derogation clauses would seem to indicate that, since the peacekeepers of the state wishing to derogate are active abroad and often far removed from home, it is difficult to conceive the situation to which the peace operation is deployed as an 'emergency threatening the life of the nation' for the state in question. On the other hand, if one interprets this notion broadly, as including "an exceptional situation of crisis which affects the whole population and constitutes a threat to the organized life of the community in which a Member State conducts a military operation", states could lawfully derogate[36]. Consequently, depending on the interpretation of the notion 'threatening the life of the nation', derogation will or will not be allowed during peace operations.

State practice – as there is none – and case law do not a provide a conclusive answer with regard to this dilemma and as such, "the state of legal uncertainty concerning the ability of participating states in a multilateral force to derogate from international human rights instruments" remains to exist[37]. Nevertheless, without going into much detail, the present argues for a broad interpretation of the derogation clauses as to allow the temporary suspension of some human rights during peace operations. This would give a clear signal in favor of the effective application of IHRL during peace operations, while at the same time considering the argument that it can be impracticable and counterproductive at times to apply some human rights during peace operations. Moreover, as Frostad has noted, since the human rights obligations of states sending peacekeepers have extraterritorial reach, "it would be in harmony with such an extension of State obligations for State rights to follow suit - i.e. the right to derogate"[38].

2.2.2 THE RELATIONSHIP WITH INTERNATIONAL HUMANITARIAN LAW

The second possible situation that may have consequences with regard to the extent IHRL applies, is the possible overlap with international humanitarian law, the body of law that stipulates the rules applicable during armed conflict. Since peacekeepers intervene during armed conflict and sometimes even actively participate in the hostilities – this will for example be the case during peace enforcement missions -, it is not unlikely that they will incur legal obligations under IHL, possibly leading to a situation in which their conduct will be governed by both IHL and

[35] Heike Krieger, *After Al-Jedda: Detention, Derogation, and an Enduring Dilemma*, 50 MILITARY LAW AND THE LAW OF WAR REVIEW 419, 435 (2011).
[36] Id. at, 436.
[37] Michael J. Dennis, *Application of Human Rights Treaties Extraterritorially to Detention of Combatants and Security Internees: Fuzzy Thinking all Around?*, 12 ILSA JOURNAL OF INTERNATIONAL & COMPARATIVE LAW 459, 476 (2006).
[38] Frostad, MILITARY LAW AND THE LAW OF WAR REVIEW, 156 (2011).

IHRL. This begs the question on how these two bodies of law relate and interact with each other: does one take precedence over the other and if so, which one? What if this is not the case? Can, and perhaps as important, should they be applied simultaneously?

Providing a conclusive answer to these questions is extremely difficult, given the complex and heavily debated relationship of IHL and IHRL. Both bodies of law were conceived with different scenarios in mind (armed conflict vs. peacetime) and, as such, have differing theoretical foundations and underlying motives. As a result, these different regimes will at times overlap, complement or contradict each other. This makes it a daunting task to reconcile IHL and IHRL in practice. In the context of detention, these issues are once again clearly visible.

Both the Third and Fourth Geneva Convention contain an extensive set of rules applicable to detention during international armed conflicts and there consists a significant overlap with the norms and standards of IHRL. At times, these rules of IHL and IHRL complement each other, as they were conceived with the same underlying purpose in mind – i.e. preserving the humanity of the detainee. This is, for example, the case with regard to the prohibition of torture and inhuman and degrading treatment, which is largely the same under both bodies of law. However, in other situations, the norms and standards of IHRL and IHL with regard to detention are in conflict. For instance, Article 9 ICCPR requires judicial supervision in the case of administrative detention, whereas Article 43 of the Fourth Geneva Conventions prescribes a more flexible regime by explicitly allowing the review by an administrative board. Which rule should take precedence? A third situation, but equally problematic, would be that IHL contains little, or some general rules on a specific aspect of detention, whereas IHRL provides a very precise and well-elaborated regulation. Such a scenario is not inconceivable in the context of non-international armed conflicts (NIACs), as the IHL applicable in NIACs only regulates the treatment of detainees, but remains silent on other aspects. Bearing the argument that the application of IHRL during armed conflicts in general and peace operations in specific can be counterproductive and inoperable in mind, one might wonder whether IHRL can or should be applied to fill this gap. Clearly, these problems need a solution.

Although, as PRUD'HOMME has correctly noted, "no human rights body has provided thus far a thorough analysis or detailed opinion clarifying the interplay between [IHL] and [IHRL], the issue has been discussed […] both at the regional and international level" and especially the ICJ has come up with several tools to manage the interplay between both bodies of law[39]. The first time the ICJ had to pronounce on the relationship between IHL and IHRL was in the *Legality of the Treat or Use of Nuclear Weapons*-case, where the question before the Court was whether the use of nuclear weapons during armed conflict would violate the right of life as laid down in Ar-

[39] Nancie Prud'homme, *Lex Specialis: Oversimplifying a More complex and Multifaceted Relationship?*, 40 ISRAEL LAW REVIEW 355, 370 (2007).

ticle 6 ICCPR. In its Advisory Opinion, the Court reaffirmed the applicability of human rights law during situations of armed conflict, immediately adding that in the specific circumstances of the case IHL should be considered as the *lex specialis* and the test whether or not the use of nuclear weapons would constituted an arbitrary deprivation of life, could "only be decided by reference to the law applicable in armed conflict and not deduced from the reference of the Covenant itself"[40].

Although instructive, the findings of the Court in the *Nuclear Weapons*-case did, however, not completely settle the issue and the Advisory Opinion has since been interpreted in different ways. On the one hand, some have argued that the Court had decided in favor of the application of IHL to the complete exclusion of IHRL and that IHL, as the law specifically designed for situations of armed conflict should thus always take precedence over IHRL[41]. This is, for example, the official position put forward by the legal representatives of the government of the USA. On the other hand, several legal scholars have publicly come out in support of the reasoning that the predominance of IHL "-though perfectly consistent for interpreting the precise content of the right to life – could not necessarily be generalized to all relations between IHL and [IHRL]"[42].

Given the discussion with regard to the exact meaning of the Advisory Opinion in the *Nuclear weapons*-case, it should not come as a surprise then that the ICJ was asked to elaborate further on the interplay between both bodies of law in a subsequent case. When confronted with the issue again in the *Wall*-case, the Court did just that:

> *As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as lex specialis, international humanitarian law*[43].

This sheds more light on the issue and two general principles have been deduced from the findings of the ICJ which should provide guidance when being confronted with questions relating to the interaction and interplay of IHL and IHRL. First, whenever the two branches of international law overlap and complement each other – and the right can thus be considered as being a matter of both –, there is room for mutual reinforcement (*principle of complementarity*). In such instances,

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[40] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996,* p. 226, par. 25.
[41] See for example, Michael J. Dennis, *Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation*, 99 THE AMERICAN JOURNAL OF INTERNATIONAL LAW 119, 139-141 (2005).
[42] International Committee on the Red Cross, XVIIth Round Table on Current Problems on International Humanitarian Law: International Humanitarian Law and Other Legal regimes, Interplay in Situations of Violence 9 (2003)., at http://www.icrc.org/eng/assets/files/other/interplay_other_regimes_nov_2003.pdf.
[43] *Wall*-case, par. 106.

the norms and standards of the one body of law could be used to supplement, interpret and help develop the other body of law, and vice versa. Second, whenever IHL and IHRL overlap but contradict each other – and the right should thus be seen as a matter of one or the other –, priority should be given to the more specific norm or the norm who regulates a specific situation (*principle of lex specialis*), which can be a rule of IHRL, as well as IHL.

These principles do go a long way in solving issues stemming from the complex relationship between IHL and IHRL. For example, with regard to the above-mentioned situation of administrative detention where IHRL requires judicial review, whereas IHL also allows for administrative review, these principles would help to determine the applicable rule. After all, the *lex specialis*-principle would point to IHL whenever the detention occurs in the military context, which would be the case when combatants or insurgents are apprehended or when the detention takes place on or in the close proximity of the battlefield since the detaining power will not have sufficient control over the situation to stage law enforcement operations. Conversely, whenever the detaining power does have such control and the detention thus occurs in the context of law enforcement, IHRL would provide the most appropriate framework.

Yet, it should be noted that the use of the principles of *complementarity* and *lex specialis* will not provide an adequate answer on all occasions. This will for example be the case when IHL contains a very general norm with regard to a certain aspect of detention and the application of the more specific standards of IHRL would be counterproductive. After all, as BELLINGER & PADMANABHAN has aptly observed, "complementarity is helpful only when the purposes of IHL and human rights law are the same" and "when the rules offered by both bodies of law are in conflict, or when one body of law has deliberately left discretion to states", specificity will not fully succeed reconciling the both bodies of law[44].

What is most important to remember for the present purposes, however, is that although the applicability of IHRL is accepted during peace operations and the relationship between IHL and IHRL is very complex, the overlap with IHL should be seen as one of the factors that have to be taken into account and can exclude or modify the application of human rights treaties. This will especially the case if IHL is the *lex specialis*. When exactly IHRL will be excluded or its application modified, depends on the norms and standards in question, as well as on the specific circumstances of the situation under consideration and should therefore be examined on a *case-to-case* basis.

[44] Bellinger & Padmanabhan, THE AMERICAN JOURNAL OF INTERNATIONAL LAW, 210 (2011).

2.2.3 UN SECURITY COUNCIL MANDATES VS. HUMAN RIGHTS LAW

A last factor that may possibly exclude or modify the application of IHRL relates to the "impact of UN Security Council resolutions on the application of [IHRL] in situations where the mandate of a peace operation contains provisions that are in apparent or genuine conflict with norms under the [human rights] treaties"[45]. Since it is not inconceivable that the mandates of peace operations, as adopted by the UNSC, place legal obligations upon the peacekeepers that run counter to the legal obligations they have under IHRL, one might argue that the obligations dictated by the UNSC should prevail over those of IHRL. After all, Article 103 UN Charter stipulates that:

> *In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligation under any other international agreement, their obligations under the present Charter shall prevail,*

However, several issues have been raised with regard to the application of Article 103 UN Charter to peace operation mandates, casting doubts about the relevance of the provision in this context. LARSEN has accurately identified these issues, formulating the following questions:

> *Does [Article 103] refer only to obligations that can be derived from the Charter itself or does it also apply to obligations which are placed on member states by decisions made by Charter bodies, e.g. the Security Council? […] Does Article 103 only apply if the Charter or a resolutions creates an obligation for a state, or does it also apply if a certain conduct is authorized? […] Does this mean that the conflicting provision is completely set aside or does it mean that the obligation under the Charter should be interpreted in a manner that allows the conflicting obligation to remain applicable to the fullest extent possible?*[46].

Although a full analysis of the scope of application and the case law with regard to Article 103 UN Charter would lead us too far, three points should be made that will shed light on the application of the provision in the context of peace operations and with regard to the detention that occurs in the course of it[47]. First, although the language of Article 103 clearly refers to 'obligations under the Charter', it is nowadays generally accepted that this phrase can also refer to decisions of the UNSC. It would be difficult to come to a different conclusion, when one reads the provision in conjunction with Article 25 of the Charter, which obliges member states to accept and carry out the decisions of the UNSC.

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[45] LARSEN, The Human Rights Treaty Obligations of Peacekeepers 314. 2012.

[46] Id. at, 314-315.

[47] For additional literature on the subject, see for example Michael Wood, *Detention During Military Operations: Article 103 of the UN Charter and the Al-Jedda Case*, 47 MILITARY LAW AND THE LAW OF WAR REVIEW 139 (2008).

Second, the answer to the question whether authorizations fall within the scope of Article 103 and should take precedence over conflicting obligations, has important repercussions in the context of detention during peace operations. The authority to detain is often derived from rather general and vague norms to be found in UNSC resolutions, such as peacekeepers 'shall have the authority to take all necessary measures to contribute to the maintenance of security and stability '.The UNSC usually does not use mandatory language when drafting peace operations mandates. Instead, it authorizes certain measures, such as administratively detaining individuals, which can help to achieve the mission objection, hereby leaving some discretion to the military commanders of the operation as to the right strategy to be followed and the most efficient measures to be used. Since administrative detention is as stated earlier problematic under some human rights treaties, whether or not authorizations are equated to obligations and thus prevail over IHRL, will determine whether such detention is available to peacekeepers in the pursuit of their mission objectives.

In this regard, it is important to mention the *Al-Jedda* judgment of the ECtHR. As mentioned above, this case concerned the detention of an individual by British troops in Iraq and one of the questions put before the Court was whether the relatively general authorization by the Security Council to administratively detain individuals for security reasons took precedence over Article 5, §1 ECHR. This article contains a limitative list of permissible grounds for detention amongst which such detention does not figure. After carefully considering the merits of the case, the Court made a clear statement by saying that:

> *The Court does not consider that the language used in this Resolution indicates unambiguously that the Security Council intended to place Member States within the Multi-National Force under an obligation to use measures of indefinite internment without charge and without judicial guarantees, in breach of their undertakings under international human rights instruments including the Convention. […] In these circumstances, in the absence of a binding obligation to use internment, there was no conflict between the United Kingdom's obligations under the Charter of the United Nations and its obligations under Article 5 § 1 of the Convention*[48].

Consequently, in the present case, the Court ruled that the authorization in the resolution under review did not fall within the scope of Article 103, that the authorization to administratively detain did not prevail over other obligations and that the British forces should thus have respected their obligations under the ECHR. Although it is difficult to make any definite statements about whether or not authorizations are ever capable of being covered by Article 103 because the Court only spoke out with regard to the specific authorization in the resolution under review, it is clear that, at least what the ECtHR is concerned, general and vague authorizations

[48] *Al-Jedda v. The United Kingdom,* par. 105.

will not take precedence in case of conflict with the relevant detention-related human rights found in the ECHR. Whether or not the other human rights bodies are of the same opinion, remains to be seen.

Finally, in response to the questions of what happens to the obligation over which Article 103 establishes precedence, KOSKENNIEMI, who studied the working of the provision in the context of the International Law Commission's study on fragmentation, answered "most commentators agree that the question here is not one of validity but of priority. The lower ranking rule is merely set aside to the extent that it conflicts with the obligation under Article 103"[49]. As a result, if a UNSC Resolution would, for example, oblige states to resort to administrative detention in certain circumstances – which is highly unlikely, but still – , this would only prevail over standards prohibiting or severely restricting such detention, without affecting IHRL rules with regard to other aspects of detention, like the amount of force that can be used during the arrest and the treatment of detainees.

3 CONCLUSION

As a result of the evolution in the tasks and responsibilities undertaken by contemporary peace operations in states emerging from conflict, peacekeepers have increasingly become involved in activities that would otherwise be performed by state authorities and are traditionally regulated by international human rights law. Detention can be seen as a prime example in this regard. This raises two important questions: do peacekeepers have any obligations under human rights law? And if so, to what extent? In this paper, the present writer has argued that the first question should be answered in the affirmative. Although one will always need to examine whether a concrete case of detention by peacekeepers falls within the scope of application of the human rights treaty in question, a consensus seems to be evolving amongst the different international judicial and quasi-judicial human rights bodies towards accepting the applicability of IHRL when peacekeepers detain an individual in the course of an operation. Whether peacekeepers will have to guarantee the full range of civil, political, social, economic and cultural rights of the detainees in their custody, however, varies. In answer to the second question, three situations were identified where the application of certain rights might be excluded or modified. First, whenever states have explicitly let know that they and have derogated from certain rights. Second, whenever IHL and IHLR are applicable at the same time and IHL can be considered as the lex specialis because IHL will apply to the exclusion of IHLR. Third, whenever there is a conflict between the obligations (and perhaps authorizations) of UNSC resolutions and IHRL because according to Article 103 of the UN Charter the UNSC resolution takes precedence. The extent to

[49] *Fragmentation of international law: difficulties arising from the Diversification and Expansion of International Law,* Report of the Study Group of the International Law Commission (UN Doc. A/CN.4/L.682), 13 April 2006, p. 170.

which the application of IHRL is modified and which specific human rights are concerned, will depend on a variety of factors and should be examined on a *case-by-case* basis.

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